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No. 73-636

# In the Supreme Court of the United States

OCTOBER TERM, 1973

FRANK W. COKER AND REGINA COKER, PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. Petitioner[1] is a carpenter shop steward who, during the year in question, regularly used his private automobile to transport himself from his home to his principal place of employment and back again, a round-trip distance of approximately 62 miles. In connection with his employment, he transported each work day approximately 200 pounds of tools. He also used his automobile in connection with his work. Relying principally on the fact that the circumstances of his job required him to carry his tools to and from work, petitioner deducted on his 1966 income tax return as ordinary and necessary business expenses under Section 162(a) of the Internal Revenue Code of

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[1]References to petitioner are to Frank W. Coker. Regina Coker is a party only because joint income tax returns were filed for the year in issue.

1954, the entire cost of driving his automobile to and from work. On audit, the Commissioner of Internal Revenue disallowed the deduction (Pet. App. B 17).

The Tax Court viewed the expenses at issue as non-deductible commuting costs because petitioner would have used his automobile to commute to work even if he were not required to carry his tools. Nevertheless, the Tax Court did not uphold the Commissioner's disallowance in its entirety because of the Second Circuit's decision in *Sullivan* v. *Commissioner,* 368 F. 2d 1007, after remand, 69-2 U.S.T.C., par. 9448, certiorari denied, 396 U.S. 827. That case had held if a taxpayer is required to carry work implements, a portion of his commuting expenses are deductible as ordinary and necessary business expenses even though the taxpayer fails to prove that he thereby incurred additional costs above commuting costs. Since petitioner's appeal was to the Second Circuit, the Tax Court followed the rule in *Sullivan,*[2] and allowed petitioner a deduction of one-third of his commuting costs even though he had failed to show that he incurred additional expenses to transport his tools (Pet. App. A 9-15). On cross appeals, the court of appeals affirmed (Pet. App. B 16-18).

After affirmance by the court of appeals, this Court announced its decision in *Fausner* v. *Commissioner,* No. 72-1396, decided June 25, 1973, rehearing denied, October 9, 1973, which resolved the conflict of decisions which had developed concerning the deductibility of the cost of transporting tools. In *Fausner,* the Court overruled the Second Circuit's decision in *Sullivan,* and held that a

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[2]Under the rule announced in *Golsen* v. *Commissioner,* 54 T.C. 742, affirmed on other grounds, 445 F. 2d 985 (C.A. 10), certiorari denied, 404 U.S. 940, the Tax Court will follow the decision of the circuit to which an appeal would be taken.

taxpayer cannot deduct his transportation expenses between his home and work even if he carries incidentals of his occupation with him, unless he can demonstrate that he incurred additional costs above his usual commuting expenses.

On July 11, and August 1, 1973, the court of appeals granted motions by both the Commissioner and petitioner to file untimely petitions for rehearing in light of this Court's *Fausner* decision. On October 17, 1973, the court of appeals denied petitioner's petition for rehearing, granted the Commissioner's petition, and reversed the Tax Court's decision insofar as it permitted petitioner to deduct part of his commuting expenses. The court of appeals noted that *Sullivan* had been overruled by *Fausner* and that petitioner had "presented no evidence to the Tax Court remotely suggesting that any additional expense was incurred because of the necessity of transporting * * * [his] tools" (Appendix, *infra*, p. 8).

2. Despite this Court's definitive ruling in *Fausner* that the expenses of transporting tools are not deductible commuting expenses unless there is evidence of additional expenses attributable only on account of the tools, petitioner urges (Pet. 5) that deduction of all commuting expenses is constitutionally mandated. Petitioner claims that to hold otherwise would permit a tax upon gross receipts rather than upon income, contrary to the Sixteenth Amendment. He further argues that Section 262 of the Code, which forecloses a deduction for personal expenses, is unconstitutionally vague.

In the sense in which petitioner uses the term "gross receipts," however, it is the same as gross income which this Court has held is subject to the taxing power. In *New Colonial Co.* v. *Helvering*, 292 U.S. 435, 440, the Court said:

> The power to tax income * * * is plain and extends to * * * gross income. Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.

See also *McDonald* v. *Commissioner,* 323 U.S. 57, 59. Since Congress has not provided a deduction for commuting expenses,[3] the decision below correctly upheld the Commissioner's disallowance of the claimed deduction.[4]

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[3]When the Internal Revenue Code of 1954 was enacted, Congress recognized that the expense incurred in commuting to and from work "constitute[d] a personal living expense and * * * [was] never deductible." H. Rep. No. 1337, 83d Cong., 2d Sess., p. A 19; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 169.

Indeed, since the enactment of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 166, commuting expenses have been considered nondeductible personal expenses. See S. 1048, 1 Cum. Bull. 101; Art. 101(a) of Treasury Regulations 62 (1921 Revenue Act); Art. 102 of Treasury Regulations 65 (1924 Revenue Act); Art. 102 of Treasury Regulations 69 (1926 Revenue Act); Art. 122 of Treasury Regulations 74 and 75 (1928 Revenue Act); Art. 122 of Treasury Regulations 77 (1932 Revenue Act); Art. 23(a)-2(c) of Treasury Regulations 86 (1934 Revenue Act); Art. 23(a)-2(c) of Treasury Regulations 94 (1936 Revenue Act); Art. 23(a)-2(c) of Treasury Regulations 101 (1938 Revenue Act); Sec. 19.23(a)-2(c) of Treasury Regulations 103 (1939 Code); Secs. 29.23(a)-2(c) and 29.23(a)-15(b) of Treasury Regulations 111 (1939 Code); Secs. 39.23(a)-2(i) and 39.23(a)-15(f) of Treasury Regulations 118 (1939 Code); Secs. 1.62-1(g), 1.162-2(e), 1.212-1(f), and 1.262-1(b)(5) of the Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.). See also *Sullivan* v. *Commissioner,* 1 B.T.A. 93.

[4]Petitioner's further contention that his commuting expenses are "acquisitive" and not personal in character is equally without merit. Indeed, the very case upon which he relies for the proposition that acquisitive expenses are deductible recognizes that commuting expenses do not fall into that category. *Primuth* v. *Commissioner,* 54 T.C. 374, 381.

3. Equally without merit is petitioner's claim (Pet. 7-8) that unless this Court grants review in this case, each taxpayer must take "pot luck," depending upon the circuit to which his appeal lies. This Court in *Fausner* not only overruled the Second Circuit's decision in *Sullivan,* but also rejected the Seventh Circuit's similar decision in *Tyne* v. *Commissioner,* 385 F. 2d 40, after remand, 409 F. 2d 485, certiorari denied, 396 U.S. 833, on remand, 29 T.C.M. 1398, affirmed, 468 F. 2d 913. Moreover, the other courts of appeals will follow this Court's *Fausner* decision.[5]

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

DECEMBER 1973.

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[5]Nothing in *Crowther* v. *Commissioner,* 269 F. 2d 292 (C.A. 9) supports petitioner's argument (Pet. 7). There, the only issue was the deductibility of transportation expenses to temporary work sites. In any event, it would appear that the Ninth Circuit has at the very least strictly limited *Crowther* to its facts, and possibly has overruled it. See, *e.g., Sanders* v. *Commissioner,* 439 F. 2d 296, certiorari denied, 404 U.S. 864.

**APPENDIX**

## UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 634/825—September Term, 1972.
(Decided October 17, 1973.)
Docket Nos. 72-2309/73-1011

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FRANK W. COKER AND REGINA COKER,
*Petitioners-Appellants and Cross-Appellees,*

against

COMMISSIONER OF INTERNAL REVENUE,
*Respondent-Appellee and Cross-Appellant.*

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Before:
CLARK *Associate Justice,** WATERMAN AND FEINBERG,
*Circuit Judges.*

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Rehearing of appeal from decision of United States Tax Court permitting deduction of part of commuting expenses because husband-taxpayer was required to carry his tools with him.

Reversed in part.

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*Associate Justice of the United States Supreme Court (Retired) sitting by designation.

**On Petition for Rehearing**

PER CURIAM:

On May 14 of this year, we affirmed a decision of the United States Tax Court, CCH Tax Ct. Mem. 1972-80, permitting appellant taxpayers to deduct one-third of the expense incurred by Mr. Coker in commuting by car to and from his job as a carpenter and shop steward at a construction site.[1] This deduction was held to be proper because Mr. Coker was required to carry his carpentry tools with him each day when driving between his home and the job site, and under this court's decision in *Sullivan* v. *Commissioner*, 368 F. 2d 1007 (1966), a taxpayer may deduct from his commuting expenses an appropriate percentage allocable to the transportation of his tools.

On June 25, however, the Supreme Court affirmed a contrary decision of the Fifth Circuit and thereby resolved a conflict among the circuits on this issue[2] by holding that commuting expenses are not deductible merely "because by happenstance the taxpayer must carry incidentals of his occupation with him." *Fausner* v. *Commissioner*, 41 U.S.L.W. 3670 (U.S. June 25, 1973) (per curiam). The Court did leave open the possibility that an appropriate amount may be deducted if "additional expenses" are "incurred for transporting job-required tools and material to and from work." (Footnote omitted.)

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[1]We also rejected the Cokers' appeals from the Tax Court, in which they contended that they should be permitted to deduct all commuting expenses, rather than just one-third. The Cokers have petitioned for rehearing of that portion of the opinion denying their claim. We adhere to our prior holding on this point.

[2]Compare *Fausner* v. *Commissioner*, 472 F. 2d 561 (5th Cir. 1972), with *Sullivan* v. *Commissioner*, 368 F. 2d 1007 (2d Cir. 1966), and *Tyne* v. *Commissioner*, 385 F. 2d 40 (7th Cir. 1967), after remand, 409 F. 2d 485 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969).

In view of the intervening decision in *Fausner*, we grant the Government's petition for a rehearing and reverse the decision of the Tax Court insofar as it permits the Cokers to deduct part of Mr. Coker's commuting expenses. *Fausner* clearly overrules *Sullivan*, and holds that none of the commuting costs are deductible when, as in this case, the taxpayer would have used his automobile in any event. In addition, the Cokers presented no evidence to the Tax Court remotely suggesting that any additional expense was incurred because of the necessity of transporting Mr. Coker's tools.

The judgment is modified in accordance with this opinion.